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No. 88-1624

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

OLGA
SAFRANEK. . . . . .Petitioner

vs.

TOWN OF LIMON, DENNIS E. COONTS, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND . . . . . Respondents

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED

WHETHER WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION V. HAMILTON BANK OF JOHNSON CITY, 473 U.S. 172, 87 L.Ed. 2d 126, 105 S.Ct. 3108 (1985) PRECLUDES PETITIONER'S 42 U.S.C. § 1983 ACTION WHEN THE UNDISPUTED FACTS POSTURED A TAKING CLAIM UNDER THE 5TH AMENDMENT JUST COMPENSATION CLAUSE AND PETITIONER HAD NOT USED AVAILABLE STATE REMEDIES AND BEEN DENIED JUST COMPENSATION.

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STATEMENT OF THE CASE

In accordance with Rule 34.2 of the Rules of the Supreme Court of the United States, Respondents offer the following statement of the case in order to correct what Respondents deem inaccuracies or omissions in the statement by Petitioner.

Paragraph 3, pages 5 and 6, of Petitioner's statement refers to "...certain illegal water wells operated by Limon." and "...Limon's illegal wells being 'upstream'...". The Tenth Circuit Court of Appeals pointed out in its Order and Judgment that "Solely for dispositional purposes in the District Court and on appeal, the fundamental claims are taken as true." Petition for Writ of Certiorari, Appendix at page A-2. However, none of Petitioner's fundamental claims asserted that any of Respondents' water wells were "illegal." A copy of the Petitioner's Complaint under Civil Rights Act (Title 42 U.S.C. § 1983) is reprinted in the Appendix to this Brief. Therefore,

there has been no finding or admission, even for solely dispositional purposes for summary judgment that any of Respondents' wells are "illegal."

In addition to taking Petitioner's fundamental claims as true for summary judgment dispositional purposes and on appeal, other facts produced through the discovery process were taken by the District Court and on appeal as indisputable. Thus relevant facts contained in the record support a determination of the following issues:

1. Whether Petitioner's claims posture a "taking" claim under the "just compensation" clause of the Fifth Amendment as incorporated in the Fourteenth Amendment; and

2. Whether Petitioner had available adequate post-deprivation state remedies; and

3. Whether Petitioner had availed herself of available post-deprivation state remedies.

The following establish that Petitioner's claims posture a "taking" under the "just compensation" clause of the Fifth and Fourteenth Amendments:

1. Petitioner's Complaint at paragraph 4.2 (Appendix to this Brief, p. A-9)

Paragraphs 5.2 and 5.3 of the Complaint allege deprivation of available water and "taking of property" without procedural due process and denial of substantive due process. (Appendix to this Brief, p.p. A-10 & A-11)

2. Petitioner answered interrogatories, inter alia, that her water rights are property rights of which she had been deprived by Respondents' actions. (Appendix to this Brief, p.p. A-14 to A-15)

3. Petitioner's son, testifying in Petitioner's behalf, stated in response to the query "...what the claim for damages in this case is..." that, "...its the loss of water." (Appendix to this Brief, p. A-16)

4. Petitioner's Trial Brief and Citation to Authorities states Petitioner's Claim as "taking without just compensation." (Appendix to this Brief, p. A-17)

5. Petitioner's Statement of Facts in her Brief for Appellant before the Tenth Circuit characterized Respondents' actions as:

> . . . constituting a deprivation or taking of private property without procedural or substantive due process and/or an unlawful and unconstitutional municipal policy, all in contravention of the Fifth and Fourteenth Amendments to the United State Constitution.

6. Petitioner has never contended that her property was taken by Respondents for private purpose.

The facts relevant to whether Petitioner had available adequate post-deprivation state remedies are as follows:

1. The Colorado Water Right Determination and Administration Act of 1969,

C.R.S. 37-92-101 et seq., as amended, regulates the adjudication and administration of water rights in the State of Colorado. Part 5 of the Act, C.R.S. 37-92-501, et seq., as amended (Appendix to this Brief, p. A-18), provides remedies for the violation of the statute. C.R.S. 37-92-502, as amended (Appendix to this Brief, p. A-23), charges the State Engineer with various powers and duties to ensure that water users adhere to water right determinations. C.R.S. 37-92-503, as amended, provides the mechanism by which an order of the State or Division Engineer is enforced. The statute provides, inter alia,

> (1)(a) In the event an order of a division engineer...is not complied with, the state engineer...shall apply to the water judge...for an injunction enjoining the person to whom such order was directed from continuing to violate same. The term "injunction" includes mandatory relief. (Appendix to this Brief, p. A-29).

The remedial provision of the Act (C.R.S. 37-92-504, as amended) states in its entirety:

> Any person who is damaged in his business or property by reason of the violation of an order issued pursuant to §37-92-502, the violation of which has been properly enjoined pursuant to §37-92-502, may bring an action against any person who has violated said order in any district court of competent jurisdiction and recover threefold the damages sustained and the cost of the suit, including reasonable attorney's fees. (Appendix to this Brief, p. A-31).

2. Article II, Section 15 of the Colorado Constitution which states in part that "Private property shall not be taken or damaged for public or private use without just compensation," forms the basis for inverse condemnation actions in the State of Colorado. (Appendix to this Brief, page A-32). Under Colorado law, Petitioner's water rights are property rights which are subject to eminent domain proceedings and inverse

condemnation proceedings. City of Grand Junction v. Kannah Creek Water Users Association, 557 P.2d 1173, 192 Colo. 284 (1976).

Finally, the facts relevant to Petitioner's use or non-use of post-deprivation state remedies available to her are as follows:

1. Robert W. Jesse, State of Colorado Division Engineer for Water Division 2, testified that Petitioner's land, and water rights exercised thereon, are within his Division and

> ...no one had ever exercised the statutory opportunity to make a call through the Division Engineer's office in behalf of the water rights...of Plaintiff and against the water rights of Defendants. (Appendix to this Brief, page A-33).

2. Petitioner's son testified that the only effort at a remedy sought by Petitioner through the Colorado State Engineer's office was one conversation he had with someone in the Division

Engineer's office for Colorado Water Division 2. (Appendix to this Brief, page A-41).

3. Respondent Delmar Beattie testified that he was familiar with Respondents' municipal affairs, including any lawsuits, administrative hearings, claims for damages, or assertions of liability against Respondents. To his knowledge, Petitioner had never pursued any remedy or demand against the Respondents prior to the filing of Petitioner's action now on review. (Appendix to this Brief, page A-45). Petitioner has submitted no evidence to the contrary except for the affidavit of Robert J. Safranek regarding his conversation with the State or Division Engineer. (Appendix to this Brief, page A-51). Petitioner has never contended that she availed herself of any Colorado state judicial remedies available to her to collect compensation for the taking of her property.

REASONS WHY THE PETITION SHOULD BE DENIED

I. BASED UPON THE HOLDINGS IN WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION V. HAMILTON BANK OF JOHNSON CITY, 473 U.S. 172, 105 S.CT. 3108, 87 L.ED. 2D (1985) AND FIRST EVANGELICAL LUTHERAN CHURCH V. COUNTY OF LOS ANGELES, 482 U.S. 304, 107 S.CT. 2378, 96 L.ED. 2D 250 (1987) THIS COURT SHOULD DENY CERTIORARI AND AFFIRM THE TENTH CIRCUIT'S DECISION THAT THE PETITIONER'S CONSTITUTIONAL CLAIMS ARE NOT RIPE.

The first paragraph of Petitioner's Argument to this Court indicates a misunderstanding of the Tenth Circuit's decision below. Petitioner submits that the "...Court of Appeals relied primarily on Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984)

and their progeny to reach their decisions." In fact, the Tenth Circuit's Order and Judgment below does not even cite either of those cases. (Appendix to Petition for Writ of Certiorari, pages A-1 through A-5)

Likewise, Petitioner's statement in the first paragraph of her argument to this Court that "...Petitioner had adequate post-deprivation state remedies, and accordingly, Petitioner's due process was satisfied..." indicates a further misunderstanding of the application of Williamson County, supra to this case. This Court has not held that the existence of adequate post-deprivation state remedies satisfies due process, but rather has decided in Williamson County, supra that there has not been a violation of the just compensation clause until a property owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining such compensation.

The undisputed facts establish that Petitioner's claim arises under the "taking without just compensation" clause of the Fifth and the Fourteenth Amendments. It is also beyond dispute that Petitioner had available at the commencement of this action several reasonable and adequate processes provided by Colorado state law, including an action in inverse condemnation, to obtain just compensation after the taking. If Petitioner is now met with a statute of limitations problem regarding these remedies, the burden of such a problem should not be placed upon Respondents since Petitioner could have pursued any of the state remedies at the commencement of this action either independently or simultaneously with this action. Petitioner made the choice to commence and maintain her claims solely under 42 U.S.C. § 1983. Petitioner did not use any of the available state procedures to the point of being denied just compensation.

Petitioner suggests this Court's decision rests upon the Tenth Circuit's interpretation of Parratt v. Taylor, supra, and Hudson v. Palmer, supra. Since the Tenth Circuit did not even cite the Parratt, supra and Hudson, supra cases in its Order and Judgment below, the issue before this Court is whether the Tenth Circuit's Order and Judgment is in conflict with the applicable decisions of this Court; namely, Williamson County, supra and First Evangelical Lutheran Church, supra.

The Tenth Circuit decided an important question of Federal law in this case in a manner consistent with the way the question has been settled by this Court. The Tenth Circuit's decision is not in conflict with the following applicable decisions of this Court: Parratt, supra, Hudson, supra, Williamson County, supra, Daniels v. Williams 106 S.Ct. 662, 54 U.S.L.W. 4090, (1986), and First Evangelical Lutheran Church, supra.

Before attempting to apply the legal theories pronounced by this Court in the leading cases, it is necessary

> "...to focus clearly upon the specific constitutional or statutory right which a plaintiff claims has been infringed; and in particular, insofar as constitutional rights are concerned, to distinguish between what might be collectively termed 'substantive' constitutional rights on the one hand, and so-called 'procedural due process' rights on the other." NIKA Corporation v. City of Kansas City, Missouri, 528 R.Supp. 343, 360 (W.D. Missouri, 1984), citing Barnier v. Szentiniklosi, 565 F.Supp. 869 (E.D. Mich. 1983).

The Court in NIKA, supra. provided an excellent analysis of the application of §1983 to Parratt, supra procedural due process type claims as opposed to the substantive due process claim made in the case before it. Although that Court's analysis was made in 1983, it is equally applicable to the decisions reached in the later cases of Hudson, supra.,

Daniels, supra, and Williamson County, supra.

Procedural due process rights arise under the due process clauses of the Fifth and Fourteenth Amendments which provide that a person shall not be deprived of "life, liberty or property without due process of law" (Constitution of the United States, Amendments V and XIV, emphasis supplied.) Obviously, the converse of this protection is that the state can deprive one of life, liberty, or property when sufficiently fair procedures are used. The question then is whether the procedures provided are constitutionally adequate.

On the other hand, substantive constitutional rights are generally those rights guaranteed by the first eight amendments to the Constitution and made applicable to the states by the Fourteenth Amendment, the Fourteenth Amendment privileges and immunities and equal protection rights, the Thirteenth,

Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendment rights, and other rights deriving from constitutional clauses such as the Contract Clause, the Ex Post Fact Clause, and the Bill of Attainder Clause. In the form in which they are recognized, substantive constitutional rights are absolute and cannot be infringed upon no matter the nature or quantity of procedural due process provided. It is essential, however, to understand the form in which a particular substantive right has been recognized by this Court in order to be able to place the proper parameters on its enforcement. Just as the Fifth Circuit refused to use the Parratt magic wand in Augustine v. Doe, 740 F. 2d 322, 329 (1984), this Court should refuse Petitioner's plea for it to use the substantive due process magic wand. The term substantive due process is not a magic wand that can make any §1983 action based on a claim of denial of substantive

due process immune to the defense of adequate post-deprivation state remedies.

In contrast to Parratt, supra, Hudson, supra, Daniels, supra, and Logan v. Zimmerman Brush Company 455 U.S. 422, 102 S. Ct. 1148, 71 L.Ed. 2d 265 (1982), this case postures a "taking" claim alleged to arise under the "just compensation" clause of the Fifth Amendment and the Fourteenth Amendment, rather than a procedural due process "deprivation" claim. The importance of the distinction is twofold; to wit:

1. The "just compensation" clause and the "due process" clauses are separate and distinct mandates, based on different legal theory, and thus, require separate analysis. NIKA, supra, citing Smoke Rise, Inc. v. Washington Suburban Sanitary Commission, 400 F.Supp. 1369, 1381 (D.Md. 1975), Comment, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative, 57 Wash. L.Rev. 715

(1982), and San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621, 641 n.4, 101 S.Ct. 1287, 1298 n.4, 67 L.Ed. 2d 551 (1981).

2. Since the "just compensation" clause guarantees a substantive Constitutional right, and not simply a right to procedural due process, Parratt, supra, Hudson, supra, Daniels, supra and Logan, supra as such, do not mandate the result in this case.

On these statements, it may initially appear, without going further, that Petitioner has stated a cognizable §1983 action assuming a "taking without just compensation" has been shown, which was admitted below for summary judgment purposes. Further analysis, however, shows this conclusion to be erroneous. Further analysis also reveals that as important as it is to recognize the procedural vs. substantive distinction, it is as equally important to "...understand the precise content and

contours of a substantive constitutional right." NIKA, supra. In this case, that is the specific substantive constitutional right prohibiting a taking of private property for public use without just compensation.

Having said substantive constitutional rights guarantee that certain things cannot be done by the State no matter how much procedural due process is provided, the question is what is it that is absolutely prohibited by the just compensation clause, as it has been interpreted by this Court. The clause provides a limitation upon the inherent power of the sovereign to take private property for public use. NIKA, supra citing Hanson Lumber Co. v. U.S., 261 U.S. 581, 587, 43 S.Ct. 442, 444, 67 L.Ed. 809 (1923) and 1 Nichols on Eminent Domain §1.14 [2] (Stackman ed. 1981). In that regard, the clause does not circumscribe the power to take but creates the substantive constitutional

right to receive "just compensation" if there is a taking. Hodel Virginia Surface Mining and Reclamation Association, Inc., 452 U.S., at 297, N. 40. However the substantive right does not include any requirement as to when, how, or by what procedures "just compensation" is to be determined and paid. Williamson County, supra. It is in this regard that Petitioner's argument fails. Petitioner's claim is based on the assumption that her substantive constitutional right to just compensation is a right to receive that compensation prior to or at the time of taking. This Court has never determined the contours and content of this constitutional substantive right to include that requirement.

This Court and lower courts have clearly held in numerous cases that compensation for a taking under the just compensation clause of the Fifth and Fourteenth Amendments need not be paid or

determined prior to or at the time of taking, as long as the property owner has available a method of obtaining compensation with reasonable legal certainty and without unreasonable delay. Williamson County, supra, and those cases cited in NIKA, supra, at p. 363 and Collier v. City of Springdale, 733 F.2d 1311, 1314 (8th Cir. 1984). Further, this requirement of this particular substantive constitutional right is met if, after a taking by a state or subordinate entity, the property owner has a meaningful ability under state law to sue and collect just compensation from the taking entity. Williamson County, supra, First Evangelical Lutheran Church, supra, Ariyoshi v. Robinson, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed. 2d 560 (1986), Shelter Creek Development Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988), Meridian Land and Mineral Co. v. Hodel, 843 F.2d 340 (9th Cir. 1988), U.S.A. v. Vogler, 859 F.2d 638 (9th Cir. 1988), Mitchell v.

Mills County, 847 F.2d 486 (8th Cir. 1988), Unity Ventures v. Lake County, 841 F.2d 770 (7th Cir. 1988), Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (9th Cir. 1987), Herrington v. Sonoma County, 834 F.2d 1488 (9th Cir. 1987), Citizen's Association of Portland v. International Raceways, Inc., 833 F.2d 760 (9th Cir. 1987), Cassettari v. Nevada County, California, 824 F.2d 735 (9th Cir. 1987), Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987), Austin v. City and County of Honolulu, 840 F.2d 678 (9th Cir. 1988), Ochoa Realty Corp. v. Faria, 815 F.2d 812 (1st Cir. 1987), Booth v. Manatee County, Florida, 812 F.2d 1372 (11th Cir. 1987), Collier v. City of Springdale, supra, Norco Const., Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986), Anthony v. Franklin County, 799 F.2d 681, 684 (11th Cir. 1986), Littlefield v. City of Afton, 785 F.2d 596, 609 (8th Cir. 1986), Harris v. Missouri Conservation Commission, 790 F2d

678, 680 (8th Cir. 1986), McMillan v. Goleta Water Dist., 792 F.2d 1453, 1457 (9th Cir. 1986), Cuzzupe v. Paparone Realty Co., 596 F.Supp 988, 990 (D.N.J. 1984), Lewis v. City of St. Louis, 607 F.Supp. 614, 619 (E.D.Mo. 1985), Atkinson v. City of Fort Collins, 583 F.Supp. 567 (D.Colo 1984), and NIKA, supra, at p. 363, Jorgenson v. City of Aurora, Colorado, 767 P.2d 756 (Colo.App. 1988).

Therefore, the "just compensation" clause does not prohibit Respondents from taking Petitioner's water for public use, even if Respondents paid no compensation for it at or before the time of taking. The guarantee of that constitutional clause is that if just compensation is not paid by Respondents, Petitioner shall have a meaningful, reasonable, and adequate means for obtaining just compensation after the taking. That guarantee and substantive constitutional right is satisfied if, in the case of a municipality such as Respondents, the state

provides an adequate remedy by way of suit. As in Parratt, supra, the question is whether the state provides the required remedy. Although the same ultimate answer is reached, the analysis is different in this type case as compared to Parratt, supra. The analogy between Parratt, supra, and the substantive rights cases such as this one is drawn by this court in the Williamson case, supra, as follows:

> The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining such compensation is analogous to the Court's holding in Parratt v. Taylor, 451 U.S. 427 (1981). There, the court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be

> impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provision of meaningful post-deprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate post-deprivation remedy for the property loss." Hudson v. Palmer, ___ U.S._____, _____ n. 12 (1984). Likewise, because the Constitution does no require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation or the taking.

There can be no question that Colorado law provides Petitioner with a full panoply of remedies and an adequate forum to seek just compensation for the taking she claims to have suffered. The Colorado Water Rights Determination and Administration Act., C.R.S. 37-92-501, et. seq. (Appendix to this Brief, page A-18) provides remedies through the State

Engineer's office and through the Colorado judicial system. In fact, under appropriate circumstances, Petitioner may have been entitled to treble damages, costs of suit, and attorney's fees under C.R.S. 37-92-504 (Appendix to this brief, page A-31). Petitioner argues that her one verbal inquiry to the State or Division Engineer's office proved the remedy to be inadequate. However, not only could Petitioner have pursued that inquiry more diligently but if she was unable to obtain the State Engineer's performance of his statutory duties in her behalf, the State of Colorado provides a remedy in the nature of mandamus through Rule 106 of the Colorado Rules of Civil Procedure. (Appendix to this Brief, p. A-53).

Under Colorado law, a property owner may bring an action for inverse condemnation to obtain just compensation for a taking of private property for public or private use without compensation by a

governmental or public entity which has refused to exercise its eminent domain power. Colorado Constitution Art. II, Sec. 15 (Appendix to this Brief, page A-32), Kratzenstein v. Board of County Commissioners, 674 P.2d 1009, 1010 (C.A. 1983), Gold Run Ltd. v. Board of County Commissioners, 554 P.2d 317, 38 Colo.App. 44 (1976), Ossman v. Mountain States Telephone & Telegraph Co., 511 P.2d 517, 32 Colo.App. 230 (1973). Respondents have the authority under the United States Constitution, the Colorado Constitution and Colorado Revised Statutes 38-6-201, et seq. (Appendix to this Brief, page A-61) to condemn Petitioner's water right but have not exercised such power of eminent domain in this case. Therefore, Petitioner clearly could have instituted inverse condemnation proceedings against Respondents in state court which are required to be conducted strictly according to the procedures set out in the eminent domain statute, C.R.S.

38-1-101, et seq. (Appendix to this Brief, page A-80), Hayden v. Board of county Commissioners, 580 P.2d 830, 833-834 (C.A. 1978). Petitioner has not contended that she used this procedure and has been denied just compensation. Since the Petitioner has not "...shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature." Williamson County, supra.

In reviewing a similar case arising in the State of Colorado, Judge Moore reviewed the state remedies available to Plaintiff and dismissed the complaint saying that,

> To the extent the complaint seeks to force municipal officials to follow applicable municipal laws, the state of Colorado provides a remedy in the nature of mandamus. Colo.R.Civ.P. 106. Further, the state provides a remedy to those who believe they have suffered a loss of property at the hands of the state. Article II. Section 15, of the Colorado Constitution makes compensable

both a taking of and damage to property inflicted by the state of Colorado or one of its constituent parts. See Mosher v. City of Boulder, Colorado, 225 F.Supp. 32 (D.Colo. 1964). The section has been read to encompass an action for inverse condemnation, where a taking is alleged and the state has not proceeded by way of an eminent domain proceeding. Ossman v. Mountain States Tel. and Tel. Co., 184 Colo. 360, 520 P.2d 738 (1974). The inverse condemnation action is tried as if it were an eminent domain proceeding pursuant to the procedure established in Colo. Rev. Stat. §38-1-101 to §38-7-107. The state also allows the property owner to bring his action for inverse condemnation in the alternative as an action for trespass. Ossman, supra.

Plaintiffs have not contended that these state remedies are unconstitutional or inadequate. Accordingly, it is difficult to conceive the manner in which they were deprived of due process without law. Atkinson v. City of Fort Collins, supra at p. 569.

CONCLUSION

Based on the foregoing facts, legal arguments and authorities, the District Court properly granted Respondents' Motion for Summary Judgment and the Tenth Circuit Court of Appeals properly affirmed the judgment of the District Court. The Petition for Writ of Certiorari should be denied by this Court and the Order and Judgment of the Tenth Circuit Court of Appeals should be affirmed by this Court.

Respectfully submitted this 28th day of April, 1989.

Robert D. Hawthorne, Esq.
ROBERT D. HAWTHORNE, P.C.
180 E. Ave. Box 218
Limon, Colorado 80828
(719) 775-2874

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

OLGA SAFRANEK, Plaintiff,	)	
vs.	)	Civil Action No._____
TOWN OF LIMON, DENNIS E. COONTZ, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND, Defendants.	)	

COMPLAINT UNDER CIVIL RIGHTS ACT
(TITLE 42 U.S.C. SECTION 1983)

For claims for relief against the defendants, and each of them, the plaintiff alleges as follows:

I. JURISDICTIONAL ALLEGATIONS

1.1 The plaintiff, Olga Safranek, is an individual who is a resident and domiciliary of the State of Colorado and who maintains and uses her own vested water rights in the County of Lincoln, State of Colorado. Olga Safranek is a "person" within the meaning of Title 42, U.S.C. Section 1983.

1.2 The Town of Limon is a municipal corporation, organized under the laws of the State of Colorado, and is a "person" within the meaning of the above Federal statute.

1.3 The defendant Dennis E. Coontz is the Mayor of the Town of Limon and the defendants Donald G. Burgess, Fred Patterson, David E. Schroeder, Howard Stone and Norman Sunderland are each a member of the Board of Trustees of the Town of Limon, collectively constituting the whole of that legislative body. These defendants are joined herein in their official capacities, and not in their individual capacities. Each such defendant is a "person" for purposes of Section 1983.

1.4 At all times material hereto, the defendant Delmar L. Beattie was the "superintendent" of the Town of Limon, and as such, was the highest administrative and executive officer of the Town of Limon, charged with the faithful execu-

tion of all of the Town of Limon's ordinances and regulations and charged with the responsibility of implementing the same. Beattie is a "person" under Section 1983 and performed all acts herein complained of under color of his official position and under color of the statutes of the State of Colorado, and the ordinances, resolutions, customs, policies and practices of the Town of Limon.

1.5 As is specified herein, the defendants, acting under the color of their official positions and under color of the laws of the State of Colorado, and the ordinances, resolutions, customs, policies and practices of the Town of Limon, have denied to the plaintiff her civil rights, as those rights are secured to her by the constitution of the United States of America. Consequently, this Court has jurisdiction over this controversy by reason of the provisions of Title 28, U.S.C., Section 1331 and 1343.

INTRODUCTORY ALLEGATIONS

2.1 Olga Safranek is the owner of certain water Wells and certain water rights located in Lincoln County, Colorado, which said water Wells and water rights were adjudicated under the laws of the State of Colorado by prior court adjudication.

2.2 Said water Wells and water rights are more particularly identified as follows:

(a) Well No. 1, as originally adjudicated, was located at a point in Lincoln County, Colorado, whence the Northeast Corner of Section 19, Township 9 south, Range 56 West of the Sixth P.M. bears North 15_0 37' East, 1586 feet;

(b) Well No. 2, as originally adjudicated, was located at a point in Lincoln County, Colorado, in the Southeast Quarter of the Northeast Quarter of Section 19, whence the Northeast Corner of Section 19, Township 9 South, Range 56

West of the Sixth P.M. bears North 24°, 0' East, 2065 feet.

2.3 That said Wells (Well No. 1 and Well No. 2, as identified above and the applicable and appropriate water rights are hereinafter referred to as the "Wells") were adjudicated by Court Decree with Well No. 1 being adjudicated for water application as of May 30, 1932 and Well No. 2 being adjudicated for water application as of January 10, 1955. Said Well No. 1 had an appropriation priority number 85 and said Well No. 2 had an appropriation priority number 203.

2.4 The Town of Limon has maintained and continues to maintain certain water wells which the town of Limon uses for various and sundry purported purposes. Some of said wells are located in proximity to the land of the plaintiff and draw water from the same water aquifer of the plaintiff. Some of the uses of the water by the Town of Limon adversely affect the water rights of the

plaintiff and injures the plaintiff's water rights.

2.5 The Town of Limon has, pursuant to various previous state water court proceedings and other avenues of approach, attempted to obtain, use and/or attack the vested water rights of the plaintiff in this matter, all to no avail.

2.6 Specifically, but not inclusively, the Town of Limon had previously instituted action in the Water Court, Water Division No. 1 of the State of Colorado, namely Civil Action No. W-4620, asking for certain absolute decrees and alternate points of diversion for certain wells purportedly owned by the Town of Limon, all of which adversely affected or related to the water rights of the plaintiff. The State Water Court in that case issued summary judgment in favor of Olga Safranek, among others, and against the Town of Limon.

2.7 Subsequent thereto, and in or about the month of December, 1980, the Town of Limon again filed an Application for Adjudication of Water Rights in the Water Court, Water Division No. 1, State of Colorado, namely Civil Action No. 80-CW-128, and attempted to adjudicate certain purported or alleged water rights with regard to a Well No. 9 owned by the Town of Limon, all of which adversely affected the plaintiff's vested water rights. The state court judge in that action issued an order which dismissed the Town of Limon's application, with prejudice.

2.8 Notwithstanding the foregoing and notwithstanding the adjudication of the plaintiff's water rights and the vested status thereof, the Town of Limon has and continues to pump water from the same aquifer or same source of water from which plaintiff derives her water, all to the detriment and damage of the plaintiff.

FIRST CLAIM OR RELIEF

AGAINST THE TOWN OF LIMON

3.1 Plaintiff incorporates herein by this specific reference, as if set forth herein in full, all of the allegations contained in the Jurisdictional Allegations and the Introductory Allegations.

3.2 The actions of the Town of Limon and/or their agents have been and are being taken pursuant to the common policy of the Town of Limon and have been and are being undertaken by official agents or representatives of the Town of Limon who held such positions with the Town of Limon that such agents' actions and/or omissions must be considered to be the official actions of the Town of Limon itself, thereby rendering the Town of Limon liable for all damages caused thereby to the plaintiff.

WHEREFORE, the plaintiff prays for relief all as more particularly hereinafter set forth.

SECOND CLAIM FOR RELIEF

AGAINST THE TOWN OF LIMON

4.1 Plaintiff incorporates herein by this specific reference, as if set forth herein in full, all of the allegations contained in the Jurisdictional Allegations, the Introductory Allegations and the First Claim for Relief Against the Town of Limon.

4.2 The actions by the Town of Limon have materially injured the vested water rights of the plaintiff and are continuing to injure said vested water rights and said actions have denied to the plaintiff and are continuing to deny to the plaintiff her rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. The Town of Limon's actions have constituted and do constitute a taking of property without procedural due process and its actions have denied substantive due process to the plaintiff, among other constitutional deprivations.

WHEREFORE, the plaintiff prays for relief all as more particularly hereinafter set forth.

THIRD CLAIM FOR RELIEF

AGAINST THE TOWN OF LIMON

5.1 Plaintiff incorporates herein by this specific reference, as if set forth herein in full, all of the allegations contained in the Jurisdictional Allegations, the Introductory Allegations and First and Second Claims for Relief Against the Town of Limon.

5.2 The Town of Limon, by pumping water from certain Wells and by taking other action adversely affecting the water rights of the plaintiff, has continually maintained and is maintaining action to deprive the plaintiff of the available water from the sources of the water decreed to the plaintiff and causing the plaintiff irreparable harm and injury by depleting the sources of water

available to plaintiff, all to her detriment and damage.

5.3 The actions of the Town of Limon come under the auspices of 42 U.S.C., Section 1983, and have deprived the plaintiff of her constitutional rights afforded to her by the United States Constitution. The Town's actions have constituted and do constitute a taking of property without procedural due process and its actions have denied substantive due process to the plaintiff, among other constitutional deprivations.

5.4 Plaintiff has and is continuing to suffer and sustain irreparable damage for which there is no plain, adequate, complete or speedy remedy at law.

WHEREFORE, the plaintiff prays for relief all as more particularly hereinafter set forth.

WHEREFORE, the plaintiff prays for relief as follows:

1. On account of the matters set forth in the First and Second Claims

for Relief Against the Town of Limon, the plaintiff prays for judgment in favor of the plaintiff and against the Town of Limon for all damages actually sustained by the plaintiff, for costs of the suit, including a reasonable sum for attorney's fees and for such other and further relief as the Court deems proper.

2. On account of the matters set forth in the Third Claim for Relief Against the Town of Limon, the plaintiff prays for judgment in favor of the plaintiff and against the defendants for entry of a preliminary permanent injunction, restraining the defendants from pumping, using or maintaining any water to the detriment or damage of the vested water rights of the plaintiff and for an Order of this Court declaring the actions of the defendants to come under the auspices and authority of 42 U.S.C., § 1983, to permanently enjoin the defendants from affecting any water rights of the plaintiff, for awarding to

the plaintiff her costs, including a reasonable amount for attorney's fees and for such other and further relief as to the Court appears proper.

CRISWELL, PATTERSON,
McNAMARA, MYLES & BELL

By /s/A. Gary Bell
A. Gary Bell, Jr.,
No. 6788
3780 South Broadway
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80110
761-0800
Attorneys for plaintiff

Plaintiff's address:

P.O. Box 417
Limon, Colorado 80828

Respondents' Interrogatory No. 25
and Petitioner's Response to
Interrogatory No. 25

Respondents' Interrogatory No. 25

As to paragraph 1.5 of your Complaint, state specifically the civil rights secured to you by the Constitution of the Untied States which you allege the Defendants have denied to you, and with respect to each such right, state specifically the action or conduct of the Defendants which has resulted in the alleged denial of those rights.

Petitioner's Response to Respondents' Interrogatory No. 25

There are two interrogatories numbered 25. This answer is to the Second No. 25. Although I do not believe I can outline and detail each and every fact in response to your question, I will attempt to answer it the best that I can and reserve the right to prove all facts and evidence at trial. Also, I believe this calls for a legal conclusion and am told

that I do not have to respond, but will, nevertheless, attempt to answer this question the best that I can. The water rights which I have adjudicated to me are property rights which are protected and I have been deprived of the same by the actions of the Town of Limon and my water rights have been materially injured.

Portion of May 31, 1984 Deposition
of Robert J. Safranek

Line Page 105

Q. Let me ask you, as far as you know, being the plaintiff's son, what the claim for damages in this case is. Is it for loss of water, or is it for damages arising from having to buy alfalfa to feed cattle or loss of alfalfa?

A. To me, it's the loss of water. How we used it, of course, may relate to loss of crop; but the loss of water has value, and that is our damage--that is her damage, not mine. Let me correct that.

Portion of Petitioner's Trial Brief
and Citation of Authorities
Page 4, paragraph 2

In the instant case, the Town of Limon has inflicted injury upon the Plaintiff by depriving the Plaintiff of her water and, accordingly, destroying the value of her land, affecting the value of her liability to grow crops, to conduct her business or operations and placing the Plaintiff in a position where she does not have the Court Decreed or otherwise allowed water rights to which she is entitled, all at the instance of the Town of Limon and its actions with regard to the unauthorized and illegal use of the water which is the subject matter of this case.

Colorado Water Right Determination and Administration Act of 1969, Part 5

REGULATION OF WATER - VIOLATIONS

37-92-501. Jurisdiction over water - rules and regulations, (1) The state engineer and the division of engineers shall administer, distribute, and regulate the waters of the state in accordance with the constitution of the state of Colorado, the provisions of this article and other applicable laws, and written instructions and orders of the state engineer, in conformity with such constitution and laws, and no other official, board, commission, department, or agency, except as provided in the article and article 8 of title 25, C.R.S. 1973, has jurisdiction and authority with respect to said administration, distribution, and regulation. It is the legislative intent that the operation of this

section shall not be used to allow ground water withdrawal which would deprive senior surface rights of the amount of water to which said surface rights would have been entitled in the absence of such ground water withdrawal, and that ground water diversions shall not be curtailed nor required to replace water withdrawn, for the benefit of surface right priorities, even though such surface right priorities be senior in priority date, when, assuming the absence of ground water withdrawal by junior priorities, water would not have been available for diversion by such surface right under the priority system. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of the foregoing duties.

(2) In the adoption of such rules and regulations the state engineer shall be guided by the principles set forth in section 37-92-502(2) and by the following:

(a) Recognition that each water basin is a separate entity, that aquifers are geologic entities and different aquifers possess different hydraulic characteristics even though such aquifers be on the same river in the same division, and that rules applicable to one type of aquifer need not apply to another type. All other factors being the same, aquifers of the same type in the same water division shall be governed by the same rules regardless of where situate.

(b) Consideration of all the particular qualities and conditions of the aquifer;

(c) Consideration of the relative priorities and quantities of all water rights and the anticipated times of year when demands will be made by the owners of such rights for waters to supply the same;

(d) Recognition that one owner may own both surface and subsurface water rights;

(e) All rules and regulations shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights;

(f) Rules and regulations may be amended or changed from time to time within the same aquifer dependent upon the then existing and forecast conditions, facts and conditions as then known, and as knowledge of the aquifer is enlarged by operating experience;

(g) Time being of the essence, rules and regulations and changes thereof proposed for an aquifer shall be published once in the county or counties where such aquifer exists not less than sixty days prior to the proposed adoption of such rules and regulations, and copies shall be mailed by the water clerk of the division to all persons who are on the mailing list of such division. Copies of such proposed regulations shall be available without charge to any owner of a

water right at the office of the water clerk;

(h) (I) Any person desiring to protest a proposed rule and regulation may do so in the same manner as provided in section 37-92-304 for the protest of a ruling of a referee, and the water judge shall hear and dispose of the same as promptly as possible;

(II) Any such protest must be filed by the end of the month following the month in which such proposed rules and regulations are published.

37-92-501.5. Special procedures with respect to plans for augmentation. Consistent with the decisions of the water judges establishing the basis for approval for plans for augmentation and for the administration of ground water, the state engineer and division engineers shall exercise the broadest latitude possible in the administration of waters under their jurisdiction to encourage and develop augmentation plans and voluntary

exchanges of water and may make such rules and regulations and shall take such other reasonable action as may be necessary in order to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state. In so doing, the state engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

37-92-502. Orders as to waste, diversions, distribution of water. (1) The state engineer or the division engineers shall issue to the owners or users of water rights and to the users of waters of the state such orders as are necessary to implement the provisions of section 37-92-501, including, but not limited to, the orders specified in subsections (2) to (7) of this section. If such orders are given orally, they shall be confirmed promptly in writing.

(2) Each division engineer shall order the total or partial discontinuance of any diversion in his division to the extent the water being diverted is not necessary for application to a beneficial use; and he shall also order the total or partial discontinuance of any diversion in his division to the extent the water being diverted is required by persons entitled to use water under water rights having senior priorities, but no such discontinuance shall be ordered unless the diversion is causing or will cause material injury to such water rights having senior priorities. In making his decision as to the discontinuance of a diversion to satisfy senior priorities, the division engineer shall be governed by the following: The materiality of injury depends on all factors which will determine in each case the amount of water such discontinuance will make available to such senior priorities at the time and place of their need. Such

factors include the current and prospective volumes of water in a tributary to the stream from which the diversion is being made; distance and type of stream bed between the diversion points; the various velocities of this water, both surface and underground; the probable duration of the available flow; and the predictable return flow to the affected stream. Each diversion shall be evaluated and administered on the basis of the circumstances relating to it and in accordance with provisions of this article and the court decrees adjudicating and confirming water rights. In the event a discontinuance has been ordered pursuant to the foregoing, and nevertheless such does not cause water to become available to such senior priorities at the time and place of their need, then such discontinuance order shall be rescinded. If a well has been approved as an alternate means of diversion for a water right for which a surface means of

diversion is decreed, such well and such surface means must be utilized to the extent feasible and permissible under this article to satisfy said water right before diversions under junior water rights are ordered discontinued. In addition to any other methods of giving notice, the posting of a written order, in plain sight, at the place of diversion shall be considered sufficient notice of the order of the division engineer; and, when so posted, such order shall be effective from the time of posting.

(3) Each division engineer shall order the release from storage of any water he finds to have been illegally or improperly stored and shall make such orders as are necessary to insure that such released waters are delivered to those owners or users of water rights who are entitled to the same and to insure that the release will not cause damage.

(4) Each division engineer with the approval of the state engineer shall

administer the movement of water involved in any plan for augmentation or water use project which is in effect in his division. If any such plan or project involves the movement of water from one division to another, then the administration of such movement shall be the direct responsibility of the state engineer, but he may act through the appropriate division engineers. In such administration the division engineers and the state engineer shall issue such orders as are necessary and appropriate and may utilize any funds, public or private, and any other resources made available to them. Each plan for augmentation shall be administered to accomplish the maximum economic use of and benefit from the water which may be available or developed for such administration if persons owning, or entitled to use water under, water rights or conditional water rights will not be injuriously affected thereby.

(5) The state engineer and the division engineers have authority to order any owner or user of a water right to install and maintain at such owner's or user's expense necessary meters, gauges, or other measuring devices and to report at reasonable times to the appropriate division engineer the readings of such meters, gauges, or other measuring devices.

(6) The state engineer and the division engineers and their duly authorized assistants and staff have the authority and duty to enter upon, and to order any person to permit the entry upon, private property at any reasonable time to inspect the various means or proposed means of diversion, transportation, and storage and the uses to which water is being, or is proposed to be, put and to read meters, gauges, and other measuring devices.

(7) The state engineer, and their duly authorized assistants have the power

and duty to issue orders so that the streams of the state may be kept clear of unnecessary dams or other obstructions which may restrict or impede the flow of water to the water users of the state.

37-92-503. Enforcement - injunction. (1) (a) In the event an order of a division engineer or the state engineer issued pursuant to section 37-92-502 is not complied with, the state engineer and the particular division engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the water judge of the particular division for an injunction enjoining the person to whom such order was directed from continuing to violate same. The term "injunction" includes mandatory relief.

(b) In such proceeding, if the court upholds the order of the state engineer, the person against whom such order was issued shall pay the costs of

the proceeding including the allowance of a reasonable attorney fee.

(2) In the case of an order with respect to the diversion of water or the release of water from reservoirs, the water judge in ruling upon such injunction shall consider, depending on the basis for the order, whether or not the water is being applied to a beneficial use; whether or not the diversion is causing or will cause injury to persons owning, or entitled to use water under, water rights having senior decreed priorities; and whether or not the release or improperly stored water would benefit other water users.

(3) Any person who has an interest in the subject matter of such proceedings may intervene, if such intervention is timely and will not cause undue delay.

(4) In the case of a violation of an injunction issued under the provisions of this section, the water judge shall try

and punish the offender for contempt of court.

(5) Such proceedings shall be in addition to, and not in lieu of any other penalties and remedies, public or private, provided by law.

37-92-504. Triple damages. Any person who is damaged in his business or property by reason of the violation of an order issued pursuant to section 37-92-502, the violation of which has been properly enjoined pursuant to section 37-92-503, may bring an action against any person who has violated said order in any district court of competent jurisdiction and recover threefold the damages sustained and the cost of suit, including reasonable attorneys' fees.

Colorado Constitution, Article II, Section 15

Section 15. Taking property for public use - compensation, how ascertained. Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be judicial question, and determined as such without regard to any legislative assertion that the use is public.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-C-494

OLGA SAFRANEK,

Plaintiff,

vs.

TOWN OF LIMON, DENNIS E. COONTS, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND,

Defendants.

AFFIDAVIT OF ROBERT W. JESSE

STATE OF COLORADO)
)
COUNTY OF _____)

Robert W. Jesse, being first duly sworn, deposes and says as follows:

1. I am the Division engineer, appointed by the State Engineer of the Department of Natural Resources, for Water Division 2 of the State of Colorado with the approval of the Executive Director of Colorado. Water Division 2 consists of all lands in the State of Colorado in the drainage basins of the Arkansas River and the Dry Cimarron

River, and streams tributary to said rivers.

2. The lands described as Sections 18 and 19, Township 9 South, Range 56 West of the 6th P.M., Lincoln County, Colorado are located within Water Division 2. As Division Engineer of said Division, I, along with the State Engineer, administer, distribute and regulate the waters of the State of Colorado Water Division 2 in accordance with the Constitution of the State of Colorado, the provisions of Article 92, Title 37 of the Colorado Revised Statutes and other applicable laws.

3. Pursuant to Part 5, Article 92, Title 37 of the Colorado Revised Statutes, I have the authority to issue to the owners or users of water rights and to the users of waters of the state such orders as are necessary to implement the provisions of CRS 37-92-501. I have the authority by statute to order the total or partial discontinuance of any diver-

sion within Division 2 to the extent the water being diverted is required by persons entitled to use water under water rights having senior priorities when the diversion is causing or will cause material injury to those water rights having senior priorities.

4. Under the above statutory authority, wells in Division 2 may be regulated (or shut down) by my order after the demand (referred to as "call") by a senior appropriator whose priority cannot be filled by the water then running on the stream or alluvium tributary to the stream. Any such order from me would depend upon my investigation of the senior appropriator's call and a determination based on those factors enumerated in CRS 37-92-502 whether the diversion by the junior appropriator is causing or will cause material injury to the water right having senior priority.

5. The tabulation listing all decreed water rights and conditional

water rights in the drainage basin of the Arkansas River located in former Water District Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 67, and in Water Division No. 2 prepared by me pursuant to CRS 37-92-402, with the approval of the State Engineer, shows decreed water rights to Safranek Well No. 1 and Safranek Well No. 2 as follows:

a. Safranek No. 1 Well - located in Section 19, Township 9 South, Range 56 West with an appropriation date of October 12, 1939 and amount of .5000 CFS.

b. Safranek No. 2 Well - located in Section 19, Township 9 South, Range 56 West with an appropriation date of January 10, 1955 and amount of 1.000 CFS.

6. The same Water Rights Tabulation shows decreed water rights to the town of Limon municipal wells as follows:

a. Limon No. 1 Well - located in Section 19, Township 9 South, Range 56

West with an appropriation date of October 12, 1939 and amount of .2100 CFS

b. Limon No. 2 Well - located in section 19, Township 9 South, Range 56 West with an appropriation date of October 12, 1939 and amount of .4000 CFS.

c. Combined well - located in Section 19, Township 9 South, Range 56 West with an appropriation date of April 1, 1955 and amount of .7400 CFS.

d. Limon No. 5 Well - located in Section 19, Township 9 South, Range 56 West with an appropriation date of April 1, 1955 and amount of .3700 CFS.

e. Limon No. 6 Well - located in Section 19, Township 9 South, Range 56 West with an appropriation date of April 1, 1955 and amount of .5200 CFS.

f. Limon No. 8 Well - located in Section 19, Township 9 South, Range 56 West with an appropriation date of April 1, 1955 and amount of .5200 CFS.

7. In the event water is being diverted by the Town of Limon under a wa-

ter right junior to a Safranek water right, Safranek may make a demand (call) to me that water being diverted is required by Safranek who is entitled to use the water under water rights having senior priorities. Upon such call by Safranek, I would follow the statutorily required procedure of determining whether the diversion by the junior appropriator is causing or will cause material injury to such water rights having senior priorities. My decision as to the discontinuance of the diversion to satisfy the senior priority would be governed by the standards set forth in CRS 39-92-502.

8. In the event I found that the Town's diversion under a junior water right was causing or would cause material injury to Safranek's water rights having senior priority, I would follow the statutory mandate and order the total or partrial discontinuance of any diversion to the extent the water being diverted is

required by the person entitled to use the water under water rights having senior priorities.

9. To the best of my knowledge, no one has ever exercised the statutory opportunity to make a call though the Division Engineer's office in behalf of the water rights exercised at Safranek No. 1 or No. 2 wells against the water rights exercised at the Limon municipal wells listed hereinabove. I have no record in the division Engineer's office of a call made in behalf of the Safranek water rights either verbally or in writing.

_____
Robert W. Jesse
Division Engineer,
Division 2

STATE OF COLORADO)
COUNTY OF)

Subscribed and sworn to be fore me, a Notary Public, by Robert W. Jesse, this _____ day of _____, 1984.

Witness my hand and official seal.

My Commission expires:

_____

_____
Notary Public

_____
Address

PORTION OF MAY 31, 1984 DEPOSITION OF ROBERT J. SAFRANEK

Q. As an attorney, are you familiar with what is called call procedures under Colorado Statutes relating to Colorado water law?

A. I'm aware that they are called procedures for surface water, yes.

Q. Do you know whether or not your mother, Olga Safranek, has ever made a call through either the state engineers office or the division engineers office?

A. I personally spoke to the--I don't know if it's district or division engineer, and he said if it's subsurface or groundwater--well water, forget it; file suit. We don't do anything.

Q. Was there ever a written call or complaint made to either the state engineer or the division engineer?

A. No. I spoke personally to them.

Q. Was there, prior to the filing of this lawsuit, to your knowledge, any

written demand made upon the town of Limon be either yourself or the plaintiff, Olga Safranek, to cease and desist from pumping any of their wells?

A. I'm not sure whether there was a written demand made to Mr. Kemp. I believe verbally they indicated that they were taking our water. Mr. Bell may have notified the town at some point, whether it was before or after litigation; but I'm not certain of that.

Q. Do you know of any written notice from you or the plaintiff, Olga Safranek, to the town of Limon prior to the institution of this litigation that the plaintiff felt the Limon's pumping of its wells were adversely affecting her wells?

A. Probably there would have been in the--I believe in the water court when we were objecting to some of the town's procedure in altering point of diversion and stuff, there could have been. I think was at least an indication that the

town could fairly have determined our position was they were affecting it.

Q. Who did you talk to about the call procedures?

A. District or division engineer, I can't think of his name now. I probably could find--I know I can recapture that name. I would have to search some records.

Q. Where was it? What division engineer did you talk to?

A. It's the one that has the division or district that we are in and immediately south of Steel Fork and some of those places.

Q. Was it Robert W. Jesse?

A. Possibly. There were two people. Jesse, but I'm not certain it was Mr. Jesse. Could have been another man. Is there another man? Do you have another one. May have been Jesse. I had some correspondence with him on another matter and it was--

Q. Division engineer for Water Division Two in the State of Colorado?

A. Is there someone, call it below him or in a smaller division. I just--Division 2 would take Pueblo all the way to the state line. I think he may have had an assistant, but I'm not certain of that. My recollection was he came out of La Junta--not La Junta, but Rocky Ford area; somewhere around there.

Q. Do you recall when this was that you talked to this person?

A. No specifically. Thinking in the mid-70's, somewhere around there.

Q. Mid-70's?

A. Yes.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-C-494

OLGA SAFRANEK,

Plaintiff,

vs.

TOWN OF LIMON, DENNIS E. COONTS, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE and NORMAN SUNDERLAND,

Defendants.

AFFIDAVIT OF DELMAR BEATTIE

STATE OF COLORADO)
)
COUNTY OF LINCOLN)

Delmar Beattie, being first duly sworn, deposes and says as follows:

1. I am the Town Superintendent of the Town of Limon, Colorado, appointed by the Town Board of Trustees, and charged with the powers and duties assigned by the ordinances of the Town of Limon, including the duty of keeping the Town Board informed as to the affairs of the

Town. I have been the Town Superintendent from 1982 to the present time.

2. Prior to being appointed Town Superintendent, I was a member of the Town Board of Trustees during the years 1968 to 1976, inclusive, and 1980 to 1982, inclusive.

3. During the years 1976 to 1978, inclusive, I was the Mayor of the Town of Limon, Colorado.

4. As a result of my service with the Town of Limon, Colorado in the varying capacities described above since 1968 to the present, I have been fully informed as to the affairs of the Town of Limon, including any lawsuits or administrative hearings in which the Town has been involved or which has been threatened to be pursued against the Town during that time. I have also been fully aware of ay claims for damages or assertions of the Town's liability for any reason made by any person during the years 1968 to the present.

5. To the best of my knowledge, no one has ever exercised the statutory opportunity to make a call through the Colorado State Engineer's office, Water Division II Office of the State of Colorado, or by ay other means in behalf of the water rights exercised by Olga Safranek at Safranek number 1 or Safranek number 2 wells against the water rights exercised a the Limon Municipal wells.

6. To the best of my knowledge, no one has ever asserted against the Town of Limon any claims for injunctive relief or damages under the Colorado Water Rights Determination and Administration Act of 1969 in behalf of Olga Safranek regarding the exercise of her water rights at Safranek number 1 or number 2 wells.

7. To the best of my knowledge no one has ever instituted or threatened to institute against the Town of Limon inverse condemnation proceedings under Article II Section 15 of the Colorado Constitution in behalf of Olga Safranek

and with regard to any alleged taking by the Town of Limon of her water rights exercised at Safranek wells number 1 or number 2.

8. To the best of my knowledge no one has ever instituted or threatened to institute against the Town of Limon a cause of action for trespass by the Town as such action would relate to the exercise of Olga Safranek's water rights relating to Safranek wells number 1 or number 2 and any damages thereto allegedly caused by such a trespass.

9. To the best of my knowledge, no one has ever instituted or threatened to institute against the Town of Limon any legal action seeking injunctive relief pursuant to Rule 65 of the Colorado Rules of Civil Procedure regarding the pumping of the Town of Limon municipal wells and any alleged adverse effect such pumping may have upon Olga Safranek's water rights.

10. To the best of my knowledge, no one has ever instituted or threatened to institute any legal action against the Town of Limon pursuant to C.R.S. 18-4-405 for the alleged conversion of any property or property right owned by Olga Safranek by the Town of Limon.

11. Prior to the commencement of Civil Action Number 82-C-494 by Olga Safranek against the Town of Limon, et al. in the United States District Court for the District of Colorado, no one has ever verbally or by any form of writing notified the Town of Limon that the pumping of its municipal wells was resulting in, or had resulted in, any material injury or deprivation of Olga Safranek's property rights.

/s/ Del Beattie
Delmar Beattie
Town Superintendent
Town of Limon,
Colorado

STATE OF COLORADO)
)
COUNTY OF LINCOLN)

Subscribed and sworn to before me, a notary public, by Delmar Beattie, this 22nd day of May, 1986.

Witness my hand and official seal.

My Commission expires:

January 3, 1990.

_____
Notary Public
180 E. Avenue, Box 218
Limon, Colorado
80828

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-C-494

OLGA SAFRANEK,

Plaintiff,

vs.

TOWN OF LIMON, DENNIS E. COONTS, DONALD G. BURGESS, FRED PATTERSON, DELMAR L. BEATTIE, DAVID E. SCHROEDER, HOWARD STONE, and NORMAN SUNDERLAND,

Defendants.

AFFIDAVIT OF ROBERT J. SAFRANEK

I, Robert J. Safranek, being first duly sworn upon my oath, depose and say:

1. That I am the son of the Plaintiff, Olga Safranek, and have personal knowledge with respect to Plaintiff's attempt to avail herself of certain available state remedies.

2. I personally contacted the State District or Division Engineer with respect to my mother's water rights on her property and he said that if it was a subsurface or ground water well problem then to go ahead and forget it and pro-

ceed to litigation, because with respect to ground water or subsurface water problems, they, being the district or division engineer, wouldn't do anything and the best way to proceed would be to file suit.

FURTHER AFFIANT SAITH NOT.

_____
Robert J. Safranek

STATE OF COLORADO)
) ss.
COUNTY OF _____)

Subscribed and sworn to before me this ____ day of July, 1986 by Robert J. Safranek.

Witness my hand and official seal.

Colorado Rules of Civil Procedure

Rule 106

Rule 106.Forms of Writs Abolished

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court, Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person. The

Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law;

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate or authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within twenty days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to

place before the court. The cost of preparing the record shall be advanced by the plaintiff, except that the court may, on objection by the plaintiff, order a defendant to advance payment for the cost of preparing such portion of the record designated by the defendant as the court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within forty days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within forty days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within thirty days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within fifteen days after service of the answer brief.

(VIII) The court may accelerate or continue any action which, in the discretion of the court, requires acceleration or continuance.

(IX) In the event the court determines that the governmental body, officer

or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or

judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.

(Amended August 23, 1985, effective January 1, 1986.)

Colorado Revised Statutes, Title 38,

Article 6, Part 2

PART 2

CONDEMNATION OF WATER RIGHTS

38-6-201. Condemnation of water rights by municipalities. This part 2 shall apply to any water right which is to be condemned by a town, city, city and county, or municipal corporation having the powers of condemnation, referred to in this part 2 as a "municipality".

38-6-202. Petition. (1) The attorney for any municipality, in the name of said municipality, shall apply to the district court of the district in which the municipality is situated, by petition, which petition shall set forth the general nature of the improvement proposed to be established or made, a correct description of the water right required, the name of the owner of the water right, and those persons who may be damaged by the acquisition of the water right. Said petition shall pray for the appointment

of three disinterested commissioners appointed by the court of jurisdiction, freeholders of real estate in Colorado, one to be a resident from the area affected by the proposed action, one to be a resident of the municipality bringing the action, and one to be a party who has no interest in the controversy, to determine the issue of the necessity of exercising eminent domain as proposed in the petition and, if the condemnation is to be allowed, to appraise and award the damages that each person damaged may sustain by reason of the appropriation and condemnation of the water right by the municipality and to perform such other duties as are in this part 2 enumerated.

(2) No municipality shall be allowed to condemn water rights, as provided in section 38-6-207, for any anticipated or future needs in excess of fifteen years, nor shall any municipality be allowed to condemn water rights that are appropriated to a prior public use.

38-6-203. Condemnation - municipal - water supplies - standards and procedures for evaluation. (1) Prior to any hearing for condemnation of water supplies and structures under this part 2, the municipality shall:

(a) Prepare or update a community growth development plan reflecting present population and resources uses and capabilities and projected population growth and resources requirements, the latter to include all resources requirements to provide for phased development of municipal services and facilities;

(b) Prepare a detailed statement describing:

(I) The water rights to be acquired under condemnation and their present uses;

(II) The effects upon the county and suitable area within the river drainage basin or basins from the change or conversion of acquired irrigation and other water supplies to domestic uses, to

include economic and environmental effects;

(III) The unavoidable adverse and irreversible effects from such taking of properties and rights; and

(IV) Alternative sources of water supply that may be acquired by appropriation, purchase, lease, conservation, or condemnation and relative acquisitions costs.

(2) The information contained in the growth development plan and statement of effects from the condemnation shall be prepared in sufficient detail to provide a meaningful basis for assessment of the aspects of the condemnation to the public if the condemnation is approved. These statements shall be presented to the commissioners appointed by the court and the defendant and shall be made available to interested parties.

38-6-204. Defendants - guardian ad litem. The owners of all property sought to be condemned for the proposed improve-

ment or who would be damaged by said improvement shall be made parties defendant. If the proceeding seeks to affect land owned by a minor or mental incompetent under legal disabilities, the legal guardian or conservator of such person shall be made party defendant. If such person has no legal guardian, the district court shall have the power to appoint a guardian ad litem to represent such person.

38-6-205. Judge to set hearing - summons - service - publication. Upon the filing of the petition, said court shall fix a date for hearing said petition, and the attorney for the petitioner shall prepare and issue a summons, directed to the defendants, notifying them of the date fixed by the court for the hearing. Jurisdiction of said defendants shall be obtained by causing the summons to be served on the defendants in like manner as is provided by the laws of this state for the service of summons in civil

actions, except as otherwise provided in this section. The date for the hearing of the petition shall not be less than ten days after the date of the service of the summons. In case any defendant does not reside in the state or is a foreign corporation or in case the attorney for the petitioner files an affidavit that he has endeavored to find such person for the purpose of causing the person to be served and that after reasonable effort he has been unable to find said person, the petitioner may cause the summons to be published for three consecutive times in any daily or weekly newspaper published in the judicial district. The date for the hearing of said petition shall not be less than ten days after the date of the last publication of said summons.

38-6-206. Answer - hearing - jury. (1) Any defendant has the right to appear in the proceeding and file an answer, in writing, with the clerk of the

court, at any time prior to the date fixed for the hearing of the petition but not thereafter, in which answer said defendant shall set forth such objections as he may have to the condemnation or appropriation of any water right owned by him or to the prosecution of said proceeding.

(2) Any defendant may file a demand for a jury trial as provided for in section 38-6-211 (1), prior to the date fixed for the hearing of the petition.

(3) At the time set for the hearing of said petition or at the time to which the hearing may have been continued by the court, the court shall proceed to hear any objections raised by the answer provided for in subsection (1) of this section. The court shall also appoint three commissioners to carry out the provisions of this part 2.

38-6-207. Duty of commissioners, determination of necessity. (1) In any case initiated for the acquisition of

water rights pursuant to this part 2, it is the duty of the commissioners to:

(a) Examine and assess the growth development plan and statement provided by the municipality, from the proposed condemnation, required in section 38-6-203, and obtain necessary information pursuant to powers granted in section 38-6-208, and make a determination as to the necessity of exercising the power of eminent domain for the proposed purposes;

(b) Provide one of the following recommendations to the court, based upon their findings;

(I) There exists no need and necessity for condemnation as proposed.

(II) There exists a need and necessity for condemnation as proposed.

(III) There exists a need and necessity for condemnation, but it is premature.

(2) In making a recommendation, as provided in subsection (1)(b)(II) of this

section, the commissioners may recommend an alternate source of water supply.

(3) The commissioners shall hear the proofs and allegations of the parties and, after viewing the premises, certify the proper compensation to be made to said owner or parties interested for the water or other property to be taken or affected, as well as all damages accruing to the owner or parties interested in consequences of the condemnation of the same.

(4) If the commissioners find there exists no need and necessity for the condemnation proposed, they shall make no finding as to the value of the condemned property.

38-6-208. Commissioners - oaths - hearing. The commissioners, before entering upon the duties of their office, shall take an oath to faithfully, promptly, and impartially discharge their duties as such commissioners. Any commissioner may administer oaths to wit-

nesses produced before him. The commissioners may issue subpoenas and compel witnesses to attend and testify, may adjourn and hold meetings, and shall hear such proofs as may be presented to them.

38-6-209. Hearing - notice - publication. After the report of the commissioners is filed with the clerk of the court, the court shall fix a time for the consideration of said report, and the petitioner shall give written notice to the defendants and all other persons who are the owners of property mentioned in said report, whether damaged, appropriated, condemned, or assessed special benefits, of the matters contained in said report and of the time so fixed by the court for the consideration thereof. The notice shall be served in like manner as is provided by the laws of this state for the service of summons in civil actions, except as otherwise provided in this section. Said persons shall be served at least ten days

before the time fixed for the consideration of the report by the court. In case any defendant or owner of any property damaged, appropriated, condemned, or assessed special benefits does not reside in the state or is a foreign corporation or in case the attorney for said petitioner files an affidavit that he has endeavored to find such person for the purpose of causing said person to be notified and that after reasonable effort he has been unable to find said person in the state, the petitioner may cause to be published a notice, of the matters affecting such person contained in said report and of the time fixed for the consideration thereof, for three successive times in some daily or weekly newspaper published in said judicial district. Said publication shall be in lieu of personal service of said notice on all such persons.

38-6-210. Objections - default - burden of proof - findings - reappraisement. Any person who is the owner of, or who has any interest in, any of the property mentioned in said report, whether appropriated or damaged or against which special benefits have been assessed, may appear, at or before the time fixed by the court for the consideration of said report, but not after said time, and file his written objection to said report. Default shall be entered against the owners of all property mentioned in said report who have not filed objections thereto within said time, and the report shall be confirmed by the court as to such persons. At the time fixed by the court for the consideration of said report, the court shall proceed to hear any objections that have been filed, except where a jury trial has been demanded, as provided for in section 38-6-211. Any party interested in said proceeding may introduce such evidence as

may tend to establish the right of the matter. The burden of proof to change any finding, award, or assessment of said commissioners shall be upon the person objecting thereto. If it appears to the court that the property of the objector has been appraised by the commissioners at more or less that the fair, actual cash market value thereof, or that the fair, direct, and actual damage to property not taken is greater or less than the amount awarded by the commissioners, or that the property of the objector is assessed a special benefit in an amount greater than it will be actually benefited by the proposed improvement, the court shall so find and shall also find what the proper award or assessment shall be, and judgment shall be rendered accordingly. The court, for good cause shown, may modify, alter, change, annul, or confirm the report of the commissioners, or any part thereof, or may order a new appraisement and assessment as to any

of the property affected in the proceeding by the same commissioners or by other commissioners appointed by the court.

38-6-211. Jury trial - motion for new trial - appellate proceedings. (1) At any time prior to the date fixed for the hearing of the petition provided for in section 38-6-205, any defendant who owns or is interested in any property to be taken, appropriated, or damaged on account of the proposed improvement may file his demand, in writing, for a trial by a jury of either six or twelve freeholders to appraise and assess the damages which said defendant or person may sustain by reason of the appropriation and condemnation of, or damage to, his property. Any person so demanding a jury, at the time of said demand, shall deposit with the clerk the jury fees for one day's services according to the rate allowed jurors in the district court. The court shall fix an early date for said trial, and on such date the defen-

dants who have made written demands for jury trial within the time provided shall proceed to submit their claims to the jury. Such jury shall be drawn as in civil actions; except that the jurors shall have the qualifications provided in this section.

(2) The court shall proceed in the same manner and with like powers as in other cases, except as otherwise provided in this part 2. At the request of any party to the proceedings, the court shall order that the jury go upon the premises sought to be taken or damaged, in charge of a sworn bailiff and in the company of any other person that the court may order, and examine the premises in person. At the conclusion of the evidence, the matters in controversy may be argued by counsel to the jury, and at the conclusion of the arguments the court shall instruct the jury in writing. The jury shall return a special verdict fixing and determining the damages or

compensation to be allowed to each defendant, severally, who has demanded a jury trial, which verdict shall include the fair, actual cash market value of the land actually taken for the improvement. Any party to the proceeding may move for a new trial in the same manner as in actions at law. The refusal of said court to grant the same may be excepted to and assigned for appeal, but no appeal shall be permitted to stay the improvement sought by the proceeding.

38-6-212. Costs - compensation. The cost of the proceedings shall be paid by the municipality. The commissioners shall be allowed a reasonable compensation for their services and expenses, the amount of which shall be fixed by the court. The court may also order that the municipality pay reasonable attorney's fees.

38-6-213. Amendments - new parties - notice. Amendment to the petition or to any paper or record in the proceedings

shall be permitted by the court whenever necessary to a fair hearing and final determination of the questions involved. Should it become necessary at any stage of the proceedings to bring in a new party, the court has the power to make such rule or order in relation thereto as may be deemed reasonable and proper. The court also has the power to make all necessary rules and orders for notice to persons of the pendency of the proceedings.

38-6-214. Decree - copy to municipality - payments - collection of assessments. After the trial hearings and determination of all objections to said report, the court shall make its judgment and decree. The decree shall describe the property so condemned and state the owner thereof and shall describe the property against which special assessments have been made and the amounts thereof. When said judgment and decree have been made by the court, the

clerk of said court shall make a certified copy thereof and after thirty days deliver the same to the municipality. Unless other provision is made in the charter of the municipality for the payment of said awards, the legislative body, within ninety days after the date of said decree, shall make the necessary appropriation for the payment of the compensation for the property condemned. The proper officers of the municipality shall compensate the respective parties entitled thereto. The municipality shall also provide for the collection of such special assessments as have been confirmed by the final decree of the court.

38-6-215. Municipality may dismiss proceedings. The attorney for the municipality commencing the proceedings has the right to withdraw said proceedings or to dismiss the same as to one or more of said defendants or as to one or more parcels of property, without prejudice, at any stage of the proceedings, and the petitioner shall pay the costs thereof.

38-6-216. Ownership in controversy - award. If the ownership of any property condemned or damaged is in controversy, the amount awarded in payment of said property or the damage thereto shall be paid into the registry of said court for the use of the successful claimants of said property as their respective interest appear to the court. All disputes as to ownership of property taken or damaged shall be tried to the court.

Colorado Revised Statutes, Title 38

Title 38, Article 1

PART I

38-1-101. Compensation - commission - jury - court. Private property shall not be taken or damaged for public or private use without just compensation. In all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a board of commissioners of not less than three disinterested and impartial freeholders pursuant to section 38-1-105(1) or by a jury when required by the owner of the property as prescribed in section 38-1-106. All questions and issues, except the amount of compensation, shall be determined by the court unless all parties interested in the action stipulate and agree that the compensation may be so ascertained by the court. In the event of such stipulation and agreement, the court shall proceed as

provided in this article for the trial of such causes by a board of commissioners or jury.

38-1-101.5. Necessity of taking land for pipelines. (1) When a court is determining the necessity of taking private land or nonfederal public land for the installation of a pipeline, the court shall require the pipeline company:

(a) To show that the particular land lies within a route which is the most direct route practicable;

(b) To post a bond with the court equal to double the amount which the court determines to be the estimated cost of restoring the affected land to the same or as good a condition as it was in prior to the installation of the pipeline; except that the pipeline company may elect to deposit cash, negotiable bonds of the United States government or any political subdivision of this state, or negotiable certificates of deposit of any bank or other savings institution

organized or transacting business in the United States equal to double such cost. Said bond shall not be released until the court is satisfied that the condemned land has been restored to the same or as good a condition as existed prior to the installation of the pipeline, and, if the affected land is productive agricultural land, that the soil which sustains the agricultural activity has been restored so as to provide for the continuation of such agricultural activity, and that any damages awarded by the court have been paid. If the condemned land is adjacent to or in proximity of the boundary of federal land of comparable use, such bond shall not be released until the company has restored the land to at least the same reclamation standards and meets such other standards and requirements for such federal land as required by the laws, rules, and regulations of the federal government.

(c) To consider exiting utility rights-of-way before any new routes are taken if the land to be condemned is adjacent to existing utility rights-of-way.

(2) When land is condemned for a pipeline, the determination of the amount of compensation to be received by the landowner shall reflect consideration of the fact that the condemned land is to be restored as required in this section.

38-1-101.7. Limitations on the use of right-of-way. (1) No easement or right-of-way for pipelines shall be used by the owner thereof or employees of such owner for any purpose other than to construct, lay, install, replace, operate, inspect, maintain, repair, renew, substitute, monitor, change the size of, and remove certain facilities placed within the easement by such owner.

(2) The owner of an easement or right-of-way shall mitigate any erosion of the land within the easement or

right-of-way caused by the owner of such easement.

38-1-102. Petition - contents - parties. (1) In all cases where the right to take private property for public or private use without the owner's consent or the right to construct or maintain any railroad, spur or side track, public road, toll road, ditch, bridge, ferry, telegraph, flume, or other public or private work or improvement which may damage property not actually taken is conferred by general laws or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner, or corporation and the compensation to be paid for, in respect of property sought to be appropriated or damaged for the purposes mentioned, cannot be agreed upon by the parties interested, or, in case the owner of the property is incapable of consenting, or his mane or residence in unknown, or he is a nonresident of the state, it

is lawful for the party authorized to take or damage the property so required to apply to the judge of the district court where the property or any part thereof is situate by filing with the clerk a petition, setting forth, by reference, his authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested as owners or otherwise, as appearing of record, if known, or, if not known, stating that fact, and praying such judge to cause the compensation to be paid to the owner to be assessed. If the proceedings seek to affect the property of persons under guardianship, the guardians or conservators of persons having conservators shall be made parties defendant. Persons interested whose names are unknown may be made parties defendant by the description or the unknown owners. In all such cases an affidavit shall be filed by or an

behalf of the petitioner, setting forth that the names of such persons are unknown.

(2) In cases where the property is sought to be taken or damaged by the state for the purpose of establishing, operating, or maintaining any state house or charitable or other state institution or improvement, the petition shall be signed by the governor or such other person as he directs or as is provided by law.

(3) Under the provisions of this section, private property may be taken for private use, for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes.

38-1-103. Summons - return - publication. (1) A summons shall be issued and served and proof of service shall be made in accordance with the Colorado rules of civil procedure. The con-

tents of such summons shall be in conformity with said rules; except that it shall notify the respondent or defendant that, upon failure to appear and defend, the court, without further notice, shall cause the compensation to be determined and title vested in the petitioner according to law. When it appears that the owners of the property sought to be condemned cannot be personally served as provided by the Colorado rules of civil procedure, an affidavit shall be filed in said cause by the petitioner or his attorney, setting forth that the person making such affidavit has made diligent inquiry and has been unable to learn the whereabouts of such owners.

(2) The court shall then order a notice to be published in some newspaper published in said county, addressed to such owners, in which notice shall be stated the name of petitioner, a full and accurate description of the property sought to be taken or condemned, the

purpose for which such condemnation is asked, the time and place at which such owners are required to appear, and the title of the of the court or name of the judge before whom said application is to be heard. The court shall also fix and determine when said notice shall be made returnable, but in no case shall it be made returnable in less than thirty days. The same shall be published at least four times in some weekly newspaper before the return day thereof. If there is no weekly newspaper published in the county in which such proceedings are had, the court shall direct that said notice be published in some newspaper, named by him published in the nearest convenient place to such county.

38-1-104. Trial - amendments - rules. No cause shall be heard earlier than thirty days after service upon the defendant or upon due publication as provided in section 38-1-103. Any number of separate parcels of property situate

in the same county may be included in one petition, and the compensation for each shall be assessed separately by the same or different commissions or juries, as the court may direct. Amendment to the petition or to any paper or record in the cause may be permitted whenever necessary to a fair trial and final determination of the questions involved. Should it become necessary at any stage of the proceeding to bring a new party before the court, the court has the power to make such rule or order in relation thereto as may be deemed reasonable and proper, and also has the power to make all necessary rules and orders for notice to parties of the pendency of the proceeding and to issue all process necessary to the execution of orders and judgments as they may be entered.

38-1-105. Adjournment - commission - compensation - defective title - withdrawal of deposit. (1) The court may adjourn the proceedings from time to time

and shall direct any further notice thereof to be given that may seem proper. The court shall hear proofs and allegations of all parties interested touching the regularity of the proceedings and shall rule upon all objections thereto. Unless a jury is requested by the owner of the property as provided in section 38-1-106, the court shall appoint a board of commissioners of not less than three disinterested and impartial freeholders to determine compensation in the manner provided in this article to be allowed to the owner and persons interested in the lands, real estate, claims, or other property proposed to be taken or damaged in such county for the purposes alleged in the petition. The court shall fix the time and place for the first meeting of such commissioners. Such meeting shall be held at least thirty days prior to the date scheduled for the trial to determine compensation. At the meeting, a voir dire examination shall be conducted by

the court and the parties to determine whether the proposed commissioners are disinterested and impartial freeholders. If the court determines that any of the proposed commissioners is not disinterested and impartial, the court shall replace such person and appoint another commissioner, who shall also be subject to voir dire examination. At the hearing to determine compensation, the court shall administer an oath to the commissioners, shall instruct them in writing as to their duties, and, at the conclusion of the testimony, shall instruct them in writing as to the applicable and proper law to be followed by them in arriving at their ascertainment. The court shall fix reasonable compensation for the services and expenses of said commissioners and shall provide the services of a court reporter to record all proceedings had by the commissioners.

(2) The commissioners, before entering upon the duties of their office,

shall take an oath to faithfully and impartially discharge their duties as commissioners, and any one of them may administer oaths to witnesses produced before them. The commissioners may request the court or clerk thereof to issue subpoenas to compel witnesses to attend the proceedings and testify as in other civil cases and may adjourn and hold meetings for that purpose. They may request the court to make rulings upon the propriety of the proof or objections of the parties. They shall hear the proofs and allegations of the parties according to the rules of evidence and, after viewing the premises or other property and without fear, favor, or partiality, shall ascertain and certify the proper compensation to be made to said owner or parties interested for the lands, real estate, claims, or other property to be taken or affected, as well as all damages accruing to the owner or parties interested in consequence of the

condemnation of the same. The commissioners shall make, subscribe, and file with the clerk of the court in which such proceedings are had a certificate of their ascertainment and assessment, in which such lands, real estate, claims, or other property shall be described with convenient certainty and accuracy.

(3) The court, upon the filing of such certificate or returning of a verdict of a jury as provided in section 38-1-107 and due proof that such compensation and separate sums, if any, are certified or found to have been paid to the parties entitled to the same or have been deposited to the credit of such parties in court or with the clerk of the court for that purpose, shall make and cause to be entered in its minutes a rule describing such lands, real estate, claims, or other property, such ascertainment or compensation with the mode of making it, and each payment or deposit of the compensation, a certified

copy of which shall be recorded and indexed in the office of the county clerk and recorder of the proper county in like manner and with like effect as if it were a deed of conveyance from the owner and parties interested to the proper parties. If there is more than one person interested as owner or otherwise in the property and they are unable to agree upon the nature, extent, or value of their respective interests in the total amount of compensation so ascertained and assessed on an undivided basis by either a commission or a jury, the nature, extent, or value of said interests shall thereon by determined according to law in a separate and subsequent proceeding and distribution made among the several claimants thereto.

(4) Upon the entry of such rule, the petitioner shall become seized in fee unless a lesser interest has been sought, except as provided in this section, of all such lands, real estate, claims, or

other property described in said rule as required to be taken, and may take possession and hold and use the same for the purposes specified in such petition, and shall thereupon be discharged from all claims for any damages by reason of any matter specified in such petition, certificate, or rule of said court. No right-of-way or easement acquired by condemnation shall ever give the petitioner any right, title, or interest to any vein, ledge, lode, or deposit found or existing in the premises condemned, except insofar as the same may be required for subsurface support.

(5) If at any time after an attempted or actual ascertainment of compensation under this article or any purchase or by donation to said petitioner of any lands, real estate, claims, or other property for purposes specified in the petition it appears that the title acquired thereby, to all or any part of such lands for the use of such petition-

er, is defective or if said assessment fails or is deemed defective, the petitioner may proceed and perfect such title by procuring an ascertainment of the proper compensation to be made to any person who has title, claim, or interest in or lien upon such lands, real estate, claims, or other property and by making payment thereof in the manner provided in section 38-1-112, as near as may be.

(6)(a) At any stage of such new proceedings or of any proceedings under this article, the court, by rule in that behalf made, may authorize the petitioner, if already in possession, to use, and, if not in possession, to take possession of and use, said premises during the pendency and until the final conclusion of such proceedings and may stay all actions and proceedings against such petitioner on account thereof, if such petitioner pays a sufficient sum into court, or to the clerk thereof, to pay the compensation in that behalf when

ascertained. The court wherein any such proceeding are had shall determine the amount such petitioner is required to pay or deposit pending any such ascertainment. In every case where possession is so authorized, it is lawful for either party to conduct the proceedings to a conclusion, if the same are delayed by the other party.

(b) Upon proper application to the court or by stipulation between the parties, the owner may withdraw from the sum so deposited an amount not to exceed three-fourths of the highest valuation evidenced or testimony presented by the petitioner at the hearing for possession, unless the petitioner agrees to a larger withdrawal, if all parties interested in the property sought to be acquired consent and agree to such withdrawal. Any such withdrawal of said deposit shall be a partial payment of the amount of total compensation to paid and shall be deducted by the clerk of the court from any award or verdict entered thereafter.

(c) The petitioner shall not take possession of the property sought to be taken or condemned earlier than in thirty days after service of the summons upon the defendant, unless the owner consents to such possession prior to the expiration of the thirty-day period.

38-1-106. Jury. The owner of the property involved in any proceeding brought under the provisions of this article, before the appointment of commissioners, as provided in section 38-1-105, and before the expiration of the time for the defendant to appear and answer, may demand a jury of freeholders residing in the county in which the petition is filed to determine the compensation to be allowed in the manner provided in this article. Such demand may be made in the pleadings or by a separate writing filed with the clerk. Such jury shall consist of six persons, unless a larger number is demanded by any party to the proceeding. In no case shall the number

of jurors exceed twelve. Any party so demanding a larger number than six jurors shall advance the fees for such additional jurors for one day's service according to the rate allowed jurors in the district court.

38-1-107. Inspection of premises - expenses - verdict. (1) When the jury has been selected and the jurors have taken an oath faithfully and impartially to discharge their duties, the court, at the request of any party to the proceeding and in the discretion of the court, may order that the jury go upon the premises sought to be taken or damaged, in charge of a sworn bailiff, and examine the premises in person. Such order shall require the party making such request to advance a sum, to be fixed by the court in such order, sufficient in the opinion of the court to defray the necessary expenses of such examination. In default of such party forthwith advancing such sum, such order shall be held for naught

upon such trial before a jury. The court shall preside in the same manner and with like powers as in other cases. Evidence shall be admitted or rejected by the court according to the rules of law. At the conclusion of the evidence, the matters in controversy may be argued by counsel to the jury. At the conclusion of the arguments, the court shall instruct the jury in writing. The jury shall retire for deliveration, in charge of a sworn officer, and when they have agreed upon a verdict the same shall be returned into court.

(2) If the jury fails to agree, it may be discharged by the court. Thereupon another jury shall be summoned as soon as practicable, in the same manner as before, and like proceedings be had with such jury or successive juries, until a verdict is had. Any party feeling aggrieved by such verdict may move before such court for a new trial in the same manner and for the same causes as in

actions at law. The refusal of such court to grant a new trial may be expected to and assigned for appeal.

38-1-108. Order of possession. The court, upon such verdict, shall proceed to adjudge and make such order as to right and justice shall pertain, ordering that the petitioner enter upon such property and the use of the same, upon payment of full compensation as ascertained. Such order with evidence of such payment shall constitute complete justification of the taking of such property.

38-1-109. Intervention - cross petition. Any person not made a party to such proceeding may become such by filing a cross petition at any time before the hearing, setting forth that he is an owner or has an interest in the property sought to be taken or damaged by the petitioner and stating the character and extent of such interest. The rights of such person shall thereupon be fully considered and determined. Except for such

cross petition, there shall be no written pleadings on the part of any party to the proceeding, but, at the hearing provided for in section 38-1-105, the court shall hear and dispose of all objections that may be raised touching the legal sufficiency of the petition or cross petition or the regularity of the proceedings in any other respect. In case any person or corporation at any time or in any manner succeeds to the right of any party in the subject matter of the proceeding, such proceeding shall not abate thereby, but such person or corporation, upon motion and upon proof of the fact of such succession, shall be substituted for such party as a party to the proceeding.

38-1-110. Appellate review. In all cases, upon final determination thereof in the district court, the judgment is subject to appellate review as provided by law and the Colorado appellate rules.

38-1-111. Possession pending appeal. In cases in which compensation

is ascertained, if the owner of the property taken or affected prosecutes an appeal as provided by law and the Colorado appellate rules, the petitioner may pay into court or to the clerk thereof the amount of compensation ascertained and awarded for the use of the owner and shall thereupon be entitled to take possession and use the property taken or affected the same as if no such appeal had been taken. The money so deposited shall remain on deposit until such appeal has been heard and determined. If the owner elects to receive such money before the determination of said appeal, the appeal shall thereupon be dismissed so far as such owner is concerned. If the appeal is taken by the petitioner, the amount of compensation shall nevertheless be paid into court or to the clerk thereof for the use of the owner of the property condemned or affected before such petitioner has the right to take possession of and use said property so con-

demned or affected. Such compensation may be paid to such owner, at any time before the determination of such appeal, upon the execution and delivery of a good and sufficient bond by such owner with good and sufficient sureties, to be approved by said court, in a sum double the amount of such compensation, conditioned that such owner will pay and refund to such petitioner all or such part of said sum as said owner may be required or adjudged to pay said petitioner, together with the cost of said appeal.

38-1-112. Payment to clerk or owner. Payment of compensation adjudged may in all cases be made to the court or the clerk thereof, who shall on demand pay the same to the party entitled thereto, taking receipt therefor. Payment may be made to the party entitled thereto or to his conservator or guardian.

38-1-113. Verdict recorded. The court shall cause the verdict of the jury

and the judgment of said court to be entered upon the records of said court.

38-1-114. Computing damages. The right to compensation and the amount thereof, including damages and benefits, if any shall be determined initially as of the date the petitioner is authorized by agreement, stipulation, or court order to take possession or the date of trial or hearing to assess compensation, whichever is earlier, but any amount of compensation determined initially shall remain subject to adjustment for one year after the date of the initial determination to provide for additional damages or benefits not reasonably foreseeable at the time of the initial determination. In estimating the value of all property actually taken, the true and actual value at such time shall be allowed and awarded. No deduction therefrom shall be allowed for any benefit to the residue of said property. In estimating damages occasioned to other portions of the

claimant's property or any part thereof other than that actually taken, the value of the benefits, if any, may be deducted therefrom. In all cases the owner shall receive the full and actual value of all property actually taken. In case the benefit to the property not actually taken exceeds the damages sustained by the owner to the property not actually taken, the owner shall not be required to pay or allow credit for such excess.

38-1-115. Contents of report or verdict. (1) Except as provided in this section, the report of the commissioners or the verdict of the jury shall contain:

(a) An accurate description of the land taken;

(b) The value of the land or property actually taken;

(c) The damages, if any, to the residue of such land or property; and

(d) The amount and value of the benefit.

(2) No findings as to damages and benefits as provided in paragraphs (c) and (d) of subsection (1) of this section shall be required in cases involving the total taking of property, nor shall either or both of such findings be required in cases involving the partial taking of property unless evidence thereof has been received by the commissioners or jury.

(3) The report of the commissioners or the verdict of the jury may also contain such other findings or answers to interrogatories as the court in its discretion may require to establish the value of the property condemned on an undivided basis.

38-1-116. Interest on award. The court shall forthwith cause the report of the commissioners or the verdict of the jury to be entered upon the records of the court, and, where possession of the property has been previously taken by the petitioner pursuant to section

38-1-105(6), it shall add to the amount of any such award interest at the rate established pursuant to section 5-12-106(2), C.R.S., on and after the date of such possession until the date such award of the commissioners or verdict of the jury is filed with the clerk of the court. No interest shall be allowed on that portion of the award which the owner and others interested received or could have received as a partial payment by withdrawal from the deposit as provided in section 38-1-105 (6), nor shall interest be allowed for the period wherein the trial of the case is delayed or continued by or at the request of the respondent.

38-1-117. Condemnation or personal property. Whenever a petitioner is specifically authorized by law to acquire personal property or interest therein by condemnation, the proceedings to acquire the same shall be governed by this article, and the petitioner shall acquire

such interest therein as may be sought and specifically described in the petition in condemnation.

38-1-118. Evidence concerning value of property. Any witness in a proceeding under articles 1 to 7 of this title, in any court of record of this state wherein the value of real property is involved, may state the consideration involved in any recorded transfer of property, otherwise material and relevant, which was examined and utilized by him in arriving at his opinion, if he has personally examined the record and communicated directly and verified the amount of such consideration with either the buyer or seller. Any such testimony shall be admissible as evidence of such consideration and shall remain subject to rebuttal as to the time and actual consideration involved and subject to objections as to its relevancy and materiality.

38-1-119. Preference on docket. To assure that property owners receive com-

pensation for the taking of their property at the earliest practical time and to reduce the interest obligation of petitioners, all courts wherein such actions are pending shall give such actions preference over other civil actions therein in the manner of setting the same for trial.

38-1-120. Acquisition of state lands - department of natural resources. All proceedings brought by the department of natural resources pursuant to the provisions of section 24-33-107(3)(a), C.R.S. 1973, for the acquisition of interests in state lands under the jurisdiction of the date board of land commissioners shall be as prescribed by this article.

38-1-121. Appraisals - negotiations. (1) As soon as a condemning authority determines that it intends to acquire an interest in property, it shall give notice of such intent, together with a description of the prop-

erty interest to be acquired, to anyone having an interest of record in the property involved. If the property has an estimated value of five thousand dollars or more, such notice shall advise that the condemning authority shall pay the reasonable costs of an appraisal pursuant to subsection (2) of this section. Such notice, however, need not be given to any of such persons who cannot be found by the condemning authority upon the exercise of due diligence. Upon receipt of such notice, such persons may employ an appraiser of their choosing to appraise the property interest to be acquired. Such appraisal shall be made using sound, fair, and recognized appraisal practices which are consistent with law. The value of the land or property actually taken shall be the fair market value thereof. Within ninety days of the date of such notice, such persons may submit to the condemning authority a copy of such appraisal. The condemning authority

immediately upon receipt thereof shall submit to such persons copies of its appraisals. If the property interest is being acquired in relation to a federal aid project, then the appraisals submitted by the condemning authority shall be those which have been approved by it pursuant to applicable statutes and regulations, if such approval is required. All of these appraisals may be used by the parties to negotiate in good faith for the acquisition of the property interest, but neither the condemning authority nor such persons shall be bound by such appraisals.

(2) If an appraisal is submitted to the condemning authority in accordance with the provisions of subsection (1) of this section, the condemning authority shall pay the reasonable costs of such appraisal. If more than one person is interested in the property sought to be acquired and such person cannot agree on an appraisal to be submitted under sub-

section (1) of this section, the condemning authority shall be relieved of any obligation herein imposed upon it to pay for such appraisals as may be submitted to it pursuant to this section.

(3) Nothing in this section shall be construed as in any way limiting the obligation of the condemning authority to negotiate in good faith for the acquisition of any property interest sought prior to instituting eminent domain proceedings or as in any way limiting the discovery rights of parties to eminent domain proceedings.

(4) Nothing is this section shall prevent the condemning authority from complying with federal and state requirements to qualify the authority for federal aid grants.

(5) Nothing in this section shall be construed to limit the right of the condemning agency to institute eminent domain proceedings or to obtain immediate possession of property as permitted by

law; except that an eminent domain proceeding may not proceed to trial on the issue of valuation until the ninety-day period provided in subsection (1) of this section has expired or the owner's appraisal has been submitted to the condemning authority whichever is sooner.

(6) If the parties involved in the negotiations fail to reach agreement on the fair market value of the property being acquired, the condemning authority, prior to proceeding to trial on the issue of valuation, shall furnish all owners of record a written final offer.

38-1-122. Attorney fees. (1) If the court finds that a petitioner is not authorized by law to acquire real property or interests therein sought in a condemnation proceeding, it shall award reasonable attorney fees, in addition to any other costs assessed, to the property owner who participated in the proceedings.

(2) Nothing in subsection (1) of this section shall be construed as limiting the ability of a property owner to recover just compensation, including attorneys fees, as may otherwise be authorized by law.